

**BEFORE THE  
PUBLIC SERVICE COMMISSION OF WISCONSIN**

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Application of the Oak Creek Water and Sewer Utility  
for Authority to Increase Water Rates

Docket 4310-WR-104

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**REQUEST FOR HEARING**

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Oak Creek Water and Sewer Utility ("Oak Creek") requests a hearing on the Public Service Commission's proposal to reopen this docket and increase Oak Creek's retail water rates.

**BACKGROUND**

On May 10, 2011, Oak Creek filed an application for a water rate increase (PSC REF#: 147950). This application was contested by Oak Creek's wholesale customers -- the City of Franklin and the Village of Caledonia. After a hearing, the Commission issued its Decision on Oak Creek's rate increase request on July 23, 2012 ("Final Decision")(PSC REF#: 169775). The rates became effective on July 24, 2012 (PSC REF#: 168875).

Oak Creek objected to the Commission's treatment of public fire protection costs in the Final Decision, and on August 13, 2012, Oak Creek filed with the Commission a petition for reconsideration or rehearing on that issue, pursuant to Wis. Stat. § 227.49(1) (PSC REF#: 170058). The Commission did not act on the petition for reconsideration or rehearing within 30 days after it was filed, so the petition was deemed denied on September 12, 2012 by operation of Wis. Stat. § 227.49(5).

On September 25, 2012, the Commission issued an order, pursuant to Wis. Stat. § 196.39(1), to reopen the entire Oak Creek water rate case "so that the Commission can review any and all issues addressed in the Final Decision mailed July 23, 2012." (PSC REF#: 172957)

The Commission did not provide Oak Creek with an opportunity to be heard prior to reopening the case.

On October 3, 2012, the Commission discussed Oak Creek's rate case at its open meeting. The Commission did not make a finding as to whether the rates established by the July 23, 2012 Final Decision were unjust or unreasonable. The Commission, however, did make a preliminary determination to revise two aspects of the Final Decision, but not the public fire protection issue that was of concern to Oak Creek. The two revisions would result in a rate increase for Oak Creek's retail customers.

On October 4, 2012, the Commission issued an Order making a preliminary determination to modify two points of the Final Decision (PSC REF#: 173880). The Order further indicated that the Commission finds there is no need for a rehearing on these issues, but that:

if any party to this proceeding believes a further opportunity for hearing on these limited issues is necessary, the party may file a request for such a hearing no later than noon, October 10, 2012. Such a request shall identify the reason why further opportunity to be heard is required. Any further hearing shall be limited solely to the two issues that the Commission modified, as explained above, and shall present only new evidence.

The October 4 Order also indicated that if no request for further hearing is received, the Commission will approve a "Revised Final Decision" and "may provide for a refund or credit resulting from the Commission's modifications of its Final Decision."

## **DISCUSSION**

### **I. This Proceeding Was Improperly Opened.**

The Commission may reopen a proceeding after it issues an order in a case if the Commission first provides the public utility affected with notice and an opportunity to be heard.

Wisconsin Statute § 196.39(1) provides that:

The commission, at any time, upon notice to the public utility and after opportunity to be heard, may rescind, alter or amend any order fixing rates, tolls, charges or schedules, or any other order made by the commission, and may reopen any case following the issuance of an order in the case, for any reason.

Here, the Commission did not provide Oak Creek with an opportunity to be heard prior to issuing an order reopening the case. This is contrary to the requirements of § 196.39(1). Since Oak Creek was not given an opportunity to be heard prior to the Commission's reopening of the Oak Creek rate case, the Commission's September 25, 2012 Order reopening is invalid and of no effect. If the Commission wishes to proceed with reopening the case, the Commission should begin again and issue a notice of intent to reopen the proceeding, and offer the parties an opportunity to be heard prior to reopening, as required by § 196.39(1).

In determining whether to reopen a case under § 196.39(1), the standards set forth in Wis. Stat. § 227.49(3) for granting a rehearing in an administrative proceeding should be applied. Section 227.49(3) conditions a rehearing upon allegations of material legal or factual error, or discovery of new evidence that could not have been previously discovered. The Commission should not reopen this proceeding unless it finds that the Commission's July 23, 2012 Final Decision is based upon material legal or factual error.

## **II. Oak Creek Has a Guaranteed Right to a Hearing Before Rates Are Revised.**

If the case is reopened, § 196.39(1) requires the Commission to provide Oak Creek an opportunity to be heard prior to the Commission rescinding, altering or amending any order fixing rates, tolls, charges or schedules. The Commission has not yet granted Oak Creek an opportunity to be heard, and the Commission's October 4, 2012 Order, suggests that the Commission may limit this right.

Oak Creek's right to be heard, however, cannot be limited in this way. Oak Creek's right to be heard is not only granted in § 196.39(1) -- it is guaranteed by Wis. Stat. § 196.20(2m) which requires a hearing prior to the Commission approving a rate change that will increase the rates to consumers. Wisconsin Statute § 196.20(2m), specifically provides that:

no change in schedules which constitutes an increase in rates to consumers may be made except by order of the commission, after an investigation and opportunity for hearing.

The Commission cannot avoid Oak Creek's guaranteed right to a hearing by acting under § 196.39. Wisconsin case law is clear that the hearing requirement set forth in § 196.20(2m) must be met even when the Commission is acting under § 196.39. As Friends of Earth v. Public Service Comm'n, 78 Wis. 2d 388, 400-401, 254 N.W. 2d 299 (1977) stated:

The power of the PSC, as a general matter, to issue temporary or "interim" orders, to amend existing rate orders, and to issue conditional orders appears clearly from secs. 196.39, 196.395 and 196.70, Stats. . . .

. . .

These powers are limited by provisions elsewhere in ch. 196 requiring a hearing before the PSC may order changes in rates to consumers.

See also Mid-Plains Telephone v. Public Service Comm'n, 56 Wis. 2d 780, 202 N.W.2d 907 (1973)( holding that the Commission's order fixing the rate structure of the utility's tariff issued without either notice or hearing afforded to the utility, "violates due process of law and is in

excess of the commission's powers"). The Wisconsin Supreme Court made an equally strong statement in Wisconsin Telephone Co. v. Public Service Comm'n, 232 Wis. 274, 300, 287 N.W. 122 (1939), recognizing that the Commission's power to set rates over the objections of the utility is dependent upon the Commission's giving the utility a hearing:

It is clear that with reference to rates, the commission has no authority to make an order without first giving the utility a hearing, whether the order be styled temporary or an order in due course, and it is immaterial whether the order is made upon a complaint, upon a summary investigation, or upon the commission's own motion.

The law is clear. Oak Creek must be given a hearing on the Commission's proposal to increase Oak Creek's retail water rates. If the Commission proceeds without first giving Oak Creek a hearing, it will be exceeding its statutory authority.

**III. Oak Creek's Existing Rates Cannot Be Revised Unless They Are Unjust or Unreasonable.**

The reopening of this proceeding does not give the Commission the right to take a fresh look at Oak Creek's original request for a rate increase. The time for that has past. The Commission already approved new rates for Oak Creek in its July 23, 2012 Decision and Order, and these rates have already gone into effect. By operation of Wis. Stat. § 196.40, these rates are "lawful and reasonable," and, in accordance with Wis. Stat. § 196.19(1), they cannot be changed except as provided in Wis. Stat. Ch. 196. While the Commission has authority to reopen a case under § 196.39(1), this authority must be exercised in accordance with the other provisions contained in ch. 196. Friends of Earth v. Public Service Comm'n, 78 Wis. 2d at 400-401.

Chapter 196 provides that the Commission has the authority to revise utility rates but only after the Commission first finds that existing rates are unjust or unreasonable. Section 196.37(1) specifically states that:

If, after an investigation under this chapter or ch. 197, the commission finds rates, tolls, charges, schedules or joint rates to be unjust, unreasonable, insufficient or unjustly discriminatory or preferential or otherwise unreasonable or unlawful, the commission shall determine and order reasonable rates, tolls, charges, schedules or joint rates to be imposed, observed and followed in the future.

This limitation on the Commission's authority to revise rates applies to all proceedings -- whether brought by a utility, a complainant, the Commission itself, or pursuant to an order to reopen. There is no provision in Chapter 196 that authorizes the Commission to change lawfully established rates that have not been shown based on substantial evidence in the hearing record to be unjust, unreasonable, insufficient, unjustly discriminatory or unlawful.

Before the Commission can revise Oak Creek's existing rates, therefore, it must find that those rates are unjust, unreasonable, insufficient, unjustly discriminatory, or unlawful. This decision must be supported by substantial evidence in the record, Wis. Stat. § 227.57(6), and a hearing is required in order to create the record upon which the Commission will base its decision. Wis. Stat. § 196.20(2m). In this hearing, evidence would have to be offered by Commission Staff or a party to show that the rates established by the Commission in the Final Decision less than three months ago, are unjust or unreasonable. Oak Creek would be entitled to rebut the evidence offered, and provide testimony on how reasonable rates for the future should be determined if existing rates are unreasonable.

This process is the one directed by the Wisconsin Supreme Court in Mid-Plains Telephone v. Public Service Comm'n, 56 Wis. 2d 780, 202 N.W.2d 907 (1973). In Mid-Plains, the Commission unilaterally issued an order deleting language from a filed tariff which had the effect of lowering the rate of some utility customers. Mid-Plains challenged the Commission's authority to issue the order because it was not provided with an adequate opportunity to be heard. The Court agreed that the Commission acted in excess of its authority when it issued an order

revising Mid-Plains' rate structure without providing Mid-Plains notice or hearing, and the Court declared the Commission's order void. The Court directed that, "[i]f in the commission's judgment, paragraph B-2-a of Mid-Plains' tariff *is unreasonable and unjust*, it may proceed according to law and amend the provision if the evidence ascertained upon adequate notice and hearing would substantiate such a decision and order." *Id.* at 788. (emphasis added.) In other words, the Commission would have the authority to modify Mid-Plains' tariff only if the evidence presented at the hearing would substantiate that the tariff was unreasonable and unjust.

The same process was followed in Wisconsin Telephone Co., 232 Wis. at 303-304, where the Court indicated that where a proceeding was instituted upon the Commission's own motion, the Commission undertook the responsibility to establish that the existing rate was unlawful and unreasonable.

This is not a case where the company was applying for a change in rates and was therefore under an obligation to go forward with its proof. This proceeding was instituted upon the commission's own motion, and it undertook to establish the basis for a finding, (1) that the existing rate was unlawful and unreasonable, and (2) what constituted a lawful and reasonable rate.

Here, the Commission cannot raise the rates of Oak Creek's retail customers until the Commission first determines that Oak Creek's existing rates, which were established by the Commission less than three months ago, are unjust, unreasonable, insufficient or unjustly discriminatory or preferential, or unlawful. A hearing must be held on this issue, and Oak Creek is entitled to -- and requests -- such a hearing.

#### **IV. The Commission Cannot Order a Refund or Credit.**

The Commission's October 4, 2012 Order indicates that the "Revised Final Decision" issued by the Commission "may provide for a refund or credit resulting from the Commission's modifications of its Final Decision." The Commission does not have the authority to order Oak

Creek to provide a refund or credit related to Oak Creek's previously authorized rates. See Wisconsin Power & Light Co. v. Public Service Comm'n, 181 Wis. 2d 385, 393-95, 511 N.W.2d 291 (1994) (“Nothing in ch. 196, Stats., suggests or implies that the PSC has the authority to order refunds or penalties for past management imprudence. The statute is plain on its face. The commission may only set rates prospectively, without recourse to backward-looking remedies.”); CenturyTel of the Midwest-Kendall, Inc. v. Public Service Comm'n, 2002 WI App 236, ¶ 32, 257 Wis. 2d 837, 653 N.W.2d 130, review dismissed, 2003 WI 1, 258 Wis.2d 111, 655 N.W.2d 130 (“Ordering a refund of rates previously authorized by the PSC, whether on an interim or permanent basis, violates the rule against retroactive ratemaking.”); Kimberly-Clark Corp. v. Public Service Comm'n, 110 Wis. 2d 455, 464-68, 329 N.W. 2d 143 (1983) (“...we conclude that there is no express or implied grant of authority ... empowering the PSC to set retroactive rates and order refunds.”); Friends of the Earth v. Public Service Comm'n, 78 Wis.2d 388, 411-413, 254 N.W.2d 299 (1977) (“To permit the PSC to condition a rate order on refund of sums collected under previously established permanent rates would directly violate the rule against retroactive rate making.”); Wisconsin Telephone Co. v. Public Service Comm'n, 232 Wis. 274, 303, 326 N.W. 122 (1939) (“...in establishing a rate for the future, and in the absence of statutory authority therefor, the commission may not amortize a loss or make a rate sufficiently low to recapture the excesses.”); Milwaukee v. West Allis, 217 Wis. 614, 620, 258 N.W. 851 (1935) (“In a public utility case the...commission appears to have no power to find reasonable value for services already rendered. Its jurisdiction is to fix rates, service, etc., to be followed in the future.”).



## **CONCLUSION**

Oak Creek requests a public hearing on the Commission's proposal to increase the rates of Oak Creek's retail customers. The hearing must address whether Oak Creek's existing rates are unjust, unreasonable, insufficient, unjustly discriminatory, or unlawful, and provide Oak Creek with an opportunity to rebut any evidence provided. The Commission cannot modify Oak Creek's existing rates unless it first finds that they are unjust or unreasonable. The Commission cannot order a credit or refund of rates previously approved under any circumstances.

Dated this 10th day of October, 2012.

Boardman & Clark LLP

By:

*/s/ Lawrie J. Kobza*

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Lawrie J. Kobza

Attorneys for Oak Creek Water Utility

One South Pinckney Street, 4th Floor

PO Box 927

Madison, WI 53701-0927

Phone: 608-283-1788

Facsimile: 608-283-1709

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